

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1128 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

RAJESH JETHALAL KHAPANDI KHARWA

Versus

STATE OF GUJARAT

Appearance:

MR YOGESH S LAKHANI for Petitioner

Mr.N.D.Gohil, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 02/02/99

ORAL JUDGEMENT

1. The prayer of the petitioner in this writ petition under Article 226 of the Constitution of India is to quash the show cause notice, Annexure : A, and the order of Externing Authority, Annexure : B, so also the order of Appellate Authority, Annexure : C to the writ petition.

2. Brief facts are that a show cause notice under Section 59(1) read with Section 56(B) of the Bombay Police Act, 1951 was issued to the petitioner on 23.6.1998 to show cause why he should not be externed from the entire district of Junagadh city as well as Rural and adjacent Districts Amreli, Rajkot and Porbandar for a period of two years. The petitioner submitted reply to the show cause notice and also examined five witnesses in his defence and produced 32 Certificates in his defence. The Externing Authority, upon considering the entire material on record, passed the impugned order of externment against the petitioner. The petitioner preferred an Appeal and the Appellate Authority dismissed the Appeal on 16.11.1998 confirming the order of the Externing Authority passed on 29.8.1998. It is, therefore, this writ petition.

3. Five points have been argued by the learned Counsel for the petitioner to challenge the two impugned orders as well as the show cause notice. The learned A.G.P. on the other hand has contended that all these points of attack have no force and the writ petition is liable to be dismissed.

4. Considering the arguments of the two sides I find that all the points of attack have substance and force. The reasons are as under :

5. The order of Externing Authority suffers from the vice of non-application of mind. He has placed reliance upon two registered offences against the petitioner. These were the offences punishable under Sections 323, 324, 504, 147, 148, 149 and 307 of Indian penal Code and also under Section 135 of the Bombay Police Act. The Externing Authority has mentioned in the impugned order that these offences are punishable under Chapter : XVI and XVII of the Indian Penal Code as it appears from internal page : 5 of the translated copy of the order of the Externing Authority in the compilation. Even the Appellate Authority was of the view that no offence punishable under Chapter : XVII of the I.P.C. was registered against the petitioner. If, therefore, Externing Authority mentioned in its order that offences were punishable under Chapter : XVII of the I.P.C. also it seems that he had not applied his mind to the provisions of Chapter : XVII and to the provision under which the offences registered at Sr.Nos.1 & 2 are punishable. These offences are punishable under Chapter : XVI of the I.P.C.

6. There is another reason to indicate that the

Externing Authority did not apply its mind while reaching subjective satisfaction regarding anti-social and criminal activity of the petitioner. The two registered offences shown in the show cause notice were of the year 1995 whereas the show cause notice was issued on 23.6.1998. No offence was registered in between 1995 and 1998. There is mention in the show cause notice that two confidential witnesses also gave secret evidence against the petitioner, but from the show cause notice it is not clear nor it is mentioned when the statements of these witnesses were recorded and what was the period during which the offences were committed by the petitioner according to these witnesswes. Thus, if there was no repetition of criminal activity between 1995 to 1998 the show cause notice could not have been issued nor the impugned order could have been passed by the Externing Authority.

7. The next ground is that the date, time and place so also the area of operation of the petitioner has not been mentioned in the show cause notice and as such the petitioner was deprived of opportunity of giving proper explanation in his defence as well as proper reply to the show cause notice. The learned A.G.P. has argued that Veraval is the place of activity, but this is a vague disclosure. The specific area in which the petitioner operated should have been disclosed. Various dates and time when the petitioner engaged himself in criminal activities should have also been disclosed so as to enable the petitioner to give effective and proper reply in his defence. Non disclosure of date time and the specific place has deprived the petitioner of giving effective reply to the show cause notice and as a result of this the show cause notice is rendered invalid so also the subsequent proceeding arising out of such vague notice.

8. The externment order is further bad inasmuch as there is nothing on record to show that there was any repeated criminal activity of the petitioner between 1995 to 23.6.1998. The confidential witnesses have not given any date nor any date was disclosed in the show cause notice. If there was no repetition of activity during these three years the show cause notice was ornamental and could not have been issued.

9. The next ground rendering the impugned order invalid is that even the extracts of statement of secret witnesses is not disclosed in the show cause notice. I am unable to accept the arguments of the learned Counsel for the petitioner that copies of statements of secret

witnesses should have been furnished. The externing Authority was justified in not furnishing the copies of secret statement of confidential witnesses, but at least there should have been some disclosure in the form of extract of statement of these two witnesses to enable the petitioner to know what those witnesses have stated against him and to enable him to furnish effective reply. This has also rendered the impugned orders invalid.

10. Another ground of attack is that the defence evidence was not at all considered and no reasons have been given why the defence evidence was not reliable. The learned A.G.P. has argued that in the impugned order the Externing Authority has mentioned that the petitioner examined five witnesses and also filed 32 certificates. However, mere recital of defence evidence is not enough. There should have been discussion like evidence of the complainant, whether defence evidence was believable or not and the reasons for believing or not believing the defence evidence was also required to be given by the Externing Authority. That has not been done and as such the order is one sided inasmuch as it fails to take into account the defence evidence all together.

11. The last ground is that no specific reason has been given by the Externing Authority as to why the petitioner was to be externed from four districts. The learned A.G.P. has argued that reasons are given in the show cause notice as well as in the order of the externing Authority, and the reason is that in these days when fast means of communication are available the petitioner may operate and indulge in his criminal activity from adjacent districts. This, to my mind, is no reason at all and if it is a reason it is a flimsy reason. The reason can be said to be flimsy on the ground that if no repetition of criminal activity of the petitioner was observed in the district Junagadh between 1995 to June, 1998, it can hardly be imagined that such activity could be continued from adjoining districts mentioned in the show cause notice. It is true that sufficiency of reasons given by the Externing Authority is not to be seen by this Court, but on the face value and on the material on record it can be said that the reasons for externing the petitioner from four districts are all together imaginary and as such the externment order cannot be sustained.

12. If the Externing Authority's order cannot be sustained the order of the Appellate Authority confirming such order also cannot be sustained.

13. In the result the writ petition succeed and is allowed. The order of Externig Authority (Annexure : B) and the order of Appellate Authority (Annexure : C) are hereby quashed. No further action can be taken on the notice Annexure : A and therefore it is not necessary to quash this notice.

sd/-

Date : February 02, 1999 (D. C. Srivastava, J.)

sas